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No. 86-271

In The
Supreme Court of the United States
OCTOBER TERM, 1986

PAT S. HOLLOWAY,
Petitioner,
v.
JUDGE DEE BROWN WALKER, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS, THE BROWNING INTERESTS AND R. JACK AYRES, JR.

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QUESTIONS PRESENTED

1. Can an unsuccessful state court defendant obtain a review of the adverse state court proceedings in the district courts of the United States by bringing suit under 42 U.S.C. § 1983 alleging denials of due process?

2. Does the *Parratt-Hudson* rule apply to an alleged denial of due process in a state court trial when the state provided appropriate appellate review procedures?

SUPPLEMENT TO PARTIES TO THE PROCEEDING

In addition to the list of individual defendants listed in the Petition for Writ of Certiorari, Respondent Jane H. Browning was sued individually and as Co-Independent Executrix and Co-Trustee of the Estate of William W. Browning, Jr., Deceased. Respondent Michael G. Starnes was sued individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for Katherine Louise Browning Cook, Averille Adams Browning Dawson, William Webb Browning, III, Winifred Fallon Browning Vaughn, and Robert Holland Browning. Respondent R. Jack Ayres, Jr., was sued individually and as a professional corporation.

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BRIEF IN OPPOSITION OF RESPONDENTS, THE BROWNING INTERESTS AND R. JACK AYRES, JR.

The Respondent Browning Interests[1] and R. Jack Ayres, Jr. respectfully request that this Court deny the Petition for Writ of Certiorari of Pat S. Holloway seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit. That court's opinions in this case are reported at 784 F.2d 1287, rehearing denied, 790 F.2d 1170 (5th Cir. 1986).

[1]The Browning Interests are Jane H. Browning, Individually and as Co-Independent Executrix and as Co-Trustee of the Estate of William W. Browning, Jr., Deceased, Michael G. Starnes, Individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for Kathryn Louise Browning Cook, Averille Adams Browning Dawson, William Webb Browning, III, Winifred Fallon Browning Vaughn, and Robert Holland Browning; Catherine Agnes Land Starnes, Individually; Kathryn Louise Browning Cook, Individually; Averille Adams Browning Dawson, Individually; William Web Browning, III, Individually; and Robert Holland Browning, Individually.

JURISDICTION

Petitioner applies for a writ of certiorari to the Court of Appeals for the Fifth Circuit. Federal jurisdiction in this case is lacking because the district court lacked federal subject matter jurisdiction to review rulings and proceedings in the state court.

STATEMENT OF THE CASE

This is the third but, unfortunately, probably not the last, petition for certiorari Petitioner Pat S. Holloway has filed within approximately a one-year period asking this Court to review, either directly or indirectly, the same state court judgment against him.[2] In this case, Holloway seeks the reversal of a summary judgment against him by a United States district court in a § 1983 suit collaterally attacking the state court judgment.[3]

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[2]The Court denied petition for writ of certiorari in Holloway's direct appeal from the state court judgment. *Humble Exploration Company, Inc. v. Browning,* 106 S.Ct. 1376 (1986), *rhg. denied,* 106 S.Ct. 1807 (1986). The Court also denied certiorari in an interlocutory appeal in this case involving Holloway and Judge Walker, one of the defendants. *Holloway v. Walker,* 106 S.Ct. 605 (1985).

[3]The statement of the case presented by the Petitioner has numerous misstatements of the proceedings in both the original state court proceedings, which are the subject of this lawsuit, and the proceedings below in this suit. Petitioner's counsel in this Court did not represent Petitioner in tbe proceedings below, in the original state court suit, or in any of the multiple collateral proceedings, and, therefore, have probably relied upon Petitioner for their assertion of the factual background involved in this case. Many of the misstatements, however, are misstatements that Holloway has repeatedly made both in these proceedings below and in multiple collateral proceedings.

While the Respondents cannot expect Petitioner's current counsel to be knowledgeable about the detailed factual background in the collateral proceedings, Petitioner's counsel should have been able to ascertain that this is an appeal from summary judgment granted by the district court for the Respondents. *Holloway v. Walker,* 784 F.2d at 1290. (Appendix to Petition (hereafter referred to as "Pet. App.") at A-7). Holloway's pleadings are not assumed to be true in an appeal from a summary judgment.

In 1979 the Brownings sued Holloway, Humble Exploration Company, Inc. and others in the state courts of Texas for damages for fraud and breach of fiduciary duties and for imposition of a constructive trust over certain corporate stock and producing mineral interests. Following numerous procedural complications and delays, including the filing of bankruptcy proceedings by Holloway on behalf of Humble and himself as a "technical legal maneuver made only for the purpose of removing to the federal courts [the] lawsuit . . .", the Brownings finally obtained a six and one-half week jury trial, which concluded with multiple jury findings adverse to Holloway. The jury found that the conduct of Holloway and the other defendants damaged the Brownings, awarding actual damages in the amount of $70 Million and punitive damages of $2 Million.[4] Based on the jury's verdict,

[4]Petitioner affirmatively misstates both the jury's findings and the legal effects of those findings under Texas law. On page 4 of the petition, Holloway states that the jury returned a verdict in his favor and that Judge Walker entered a judgment n.o.v. in furtherance of a conspiracy against him. In special issues 2 and 9 the jury found that Holloway violated his fiduciary duties to Browning by acquiring shares of stock in Humble for his own account, and in special issues 12 and 13 found that Holloway defrauded Browning in connection with the acquisition of the stock in question. In special issue 15 the jury found that Pat Holloway and others entered into a conspiracy to defraud the plaintiffs of their rights as shareholders in the company with malice. Holloway repeatedly ignores those findings. Holloway instead claims that in response to special issues 1 and 5, the jury found that he ". . . had *not* agreed to hold the shares of Humble Exploration Company issued in his name for the use and benefit of the Browning Interests . . . and that Holloway had *not* defrauded the Browning Interests. The jury further concluded that the Browning Interests were entitled to no damages whatever. Special Jury Issues Nos. 1, 5, 83." (Petition at 4, n.4) (Holloway's emphasis). Apparently, Petitioner asserts that the jury's failure to find affirmatively for a party on each theory of recovery on which he has the burden of proof is equivalent to a jury finding in favor of his adversary. Stated differently, Petitioner apparently contends that the jury's negative answers to certain special issues is an affirmative finding of the opposite fact. This simply is not the law in Texas. *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191 (Tex. 1966). The Browning Interests' failure to prevail on some of their claims did not affect the multiple findings in their favor.

and its own additional findings as a matter of law, the trial court entered a judgment granting the Brownings a constructive trust over substantially all of the assets of Holloway and the other defendants and damages totalling $72 Million.[5]

Holloway and the other state court defendants appealed in the state system. However, prior to taking that appeal, Holloway filed this suit on behalf of Humble, Sterling Pipeline Company, another defendant, and himself.[6] This suit was but the first in a litany of collateral attacks by Holloway or his family on the validity of the state court judgment, including a declaratory judgment proceeding,[7] a RICO

[5]Holloway states that the constructive trust has included his residence, his inheritance, and many of his personal effects. (Petition at 4). The Browning Interests have never contended that the constructive trust on Holloway's property extended to his inheritance. With respect to the assets that were covered by the constructive trust, the jury found that Holloway and the other defendants had commingled assets to which the Browning Interests were entitled with their own assets. Under Texas law, a party who wrongfully commingles trust property has the burden of proof to trace and segregate the assets *not* subject to constructive trust. *Eaton v. Husted*, 141 Tex. 349, 172 S.W.2d 493 (1943). Holloway simply failed factually and legally to meet his burden.

[6]Although Holloway and Humble were both in bankruptcy with a bankruptcy trustee appointed over both estates, Holloway filed this lawsuit without obtaining permission of either the bankruptcy trustee or the bankruptcy court. Subsequently, the bankruptcy trustee obtained permission of the bankruptcy court to join Holloway in this suit. While this suit has been on appeal, the bankruptcy trustee obtained permission from the bankruptcy court to withdraw from participation in litigation between Holloway and the Browning Interests and to permit Holloway to pursue whatever legal claims he desires.

[7]Neither the state court defendants nor the bankruptcy trustee for Holloway and Humble filed a supersedeas bond when they appealed the state court judgment. Therefore, the Browning Interests requested that the bankruptcy trustee, Don Navarro, and the defendants voluntarily turn over property belonging to the Browning Interests under the constructive trust. When the request was rejected, the Browning Interests filed a turnover suit in the United States district court, under its bankruptcy jurisdiction, as required by a prior agreement in the bankruptcy court, in order to obtain possession of their property during the pendency of the

case,[8] multiple collateral state attacks,[9] attacks in the

state appeal. In the turnover suit, Holloway and the other defendants therein filed a declaratory judgment proceeding as a counterclaim, asking the United States district court to hold that the remand from the bankruptcy court was not effective, that the state courts lacked jurisdiction of the case, and that the state court judgment was void because Judge Walker was neither a retired nor visiting judge. Holloway's statement in this petition that his position in the turnover suit was merely defensive misstates the record. The filing of a counterclaim is an affirmative, not defensive, action. He sought not only to prevent the Browning Interests from obtaining possession of their property during the appeal of the state court judgment but also to have the state court judgment set aside by the federal courts. *Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984).

[8]In May, 1984, Holloway, appearing as an attorney, purportedly on behalf of his daughter and various owners of royalty interests in wells operated by Humble, filed in the United States district court a RICO action against the persons who were defendants in this case. As an attorney in that case, Holloway made the same conspiracy allegations and claimed the defendants had corrupted the 162nd District Court and asked the court to declare the judgment in this case void and enjoin its enforcement. In response to defendants' interrogatories, the plaintiffs answered that they had no personal knowledge of the facts in support of the allegations, that the knowledge was that of their attorney, Holloway, and that his knowledge was privileged as work product. The RICO suit was dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b) in July, 1985.

[9]After receiving adverse rulings in the spring of 1985 in this case, the turnover suit and his direct appeal in the Texas appellate courts, Holloway filed two suits in June and July, 1985, in a Lee County, Texas, district court collaterally attacking the judgment. The suits were practically identical except for a variation of parties. Holloway, members of his immediate family, and former colleagues of Holloway were plaintiffs in the first Lee County suit. Holloway filed the second suit as the attorney for members of his immediate family. Both suits essentially repeated the allegations in this suit, in which summary judgment had already been rendered against him, and added numerous other allegations. Both suits asked the Lee County district court to declare the judgment in this case void, enjoin its enforcement and enjoin the Respondents from complying with the United States district court's subsequent turnover orders in the turnover suit. The Lee County court announced that it would grant a temporary injunction prohibiting the Respondents from receiving any property from the bankruptcy trustee, who in 1985 had been ordered to turn over property to the Respondents. The Lee County court did not sign such an injunction but instead entered an order declaring the judgment in this case void. The Texas Supreme Court stayed the Lee County court's order and subsequently granted a conditional mandamus directing the judge of the Lee County court to vacate his order. *Browning v. Placke,*

bankruptcy court,[10] and even original proceedings in the Fifth Circuit.[11]

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698 S.W.2d 362 (Tex. 1985). These Lee County cases, which were consolidated, were subsequently dismissed for lack of jurisdiction on January 10, 1986. Holloway is currently appealing that dismissal in the Texas appellate courts.

[10]In May, 1986, Holloway filed in the bankruptcy court in his individual bankruptcy case multiple objections to the Browning Interests' claims for payment of some of their damage award out of the assets of the Holloway bankruptcy estate. He repeated the same allegations as presented in this case and the Lee County suits, along with additional arguments and asked the bankruptcy court to hold the state court judgment void. The bankruptcy court denied Holloway's objections. He has appealed the denial to the United States district court, where the appeal is currently pending.

[11]While this case was pending in the Fifth Circuit, Holloway's family and co-counsel in the Lee County cases filed additional collateral attacks against the validity of the state court judgment in the form of original proceedings. These motions asked the Fifth Circuit *sua sponte* to stay orders in the turnover suit and to declare the state court judgment void on the grounds that Holloway had a previously undisclosed diplomatic immunity from suits in Texas courts as a Bolivian consul, and that the state court judgment was obtained in an alleged violation of Holloway's civil rights and related matters. In addition, Holloway's latest wife, herself a convicted felon, stated in her papers to the Fifth Circuit that she had armed herself and threatened to do violence to anyone who attempted to enforce the turnover orders of the United States district court. The Fifth Circuit denied those motions.

Holloway was found by the district court in the turnover suit to be in contempt of court for refusing to obey that court's orders to turnover certain property to the Browning Interests. Holloway then filed an original habeas corpus proceeding in the Fifth Circuit, again attacking the validity of the state court judgment on the basis of his purported diplomatic immunity and multiple other grounds. The Fifth Circuit denied the application. [Appendix A-1]. The Fifth Circuit has also found that Holloway was terminated as an honorary Bolivian consul prior to the state court suit and that he has known of that termination at least since February, 1979. Respondents' suggestion for contempt and disciplinary action based upon the making of fictitious and fraudulent claims before that court and for unethical conduct are being retained by the Fifth Circuit until after this Court rules on this petition for certiorari.

Holloway has repeatedly used this pattern of collateral attacks on state court judgments in the past as an attorney. *See,* note 14, *infra,* and *Atchley v. Greenhill,* 373 F.Supp. 512 (S.D. Tex. 1974), *aff'd,* 517 F.2d 692 (5th Cir. 1975), *cert. denied,* 424 U.S. 915 (1976) (Holloway's claims of corruption by seven then-sitting members of the Texas Supreme Court, two of whom are now judges on the Fifth Circuit, were dismissed by the district court as frivolous and as an improper attempt to review state court proceedings in a lower federal court).

In the turnover suit, Holloway initially succeeded in obtaining a judgment from the United States district court that the state court judgment was void and that the state courts lacked jurisdiction because Judge Walker was neither a retired nor visiting judge.[12] The Texas court of appeals found that Holloway and the other defendants' conduct in the federal court was fundamentally inconsistent with continued simultaneous prosecution of an appeal in the courts of Texas. It, therefore, dismissed the appeal. *Humble Exploration Company v. Browning,* 677 S.W.2d 111 (Tex. App. 1984).[13]

Simultaneous with their state court appeal and their declaratory judgment action in the turnover suit, Holloway, Humble, Sterling and the trustee sought in this suit to obtain the following:

1. a declaratory judgment that the Brownings were completely and conclusively barred from obtaining

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[12]*Browning v. Navarro,* 37 B.R. 201 (N.D. Tex. 1983). The Fifth Circuit subsequently reversed this decision by the district court, holding that the parties had complied with the requirements of presenting the case to a retired or visiting judge upon remand, that the state courts had jurisdiction over the proceedings, and that the state court judgment was not void. *Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984). Following remand, the district court rejected further arguments that the state court judgment was void and held that the Browning Interests were entitled to possession of the constructive trust property but denied their conversion claim against the trustee. Holloway is currently appealing that judgment. The Browning Interests are appealing the district court's ruling on conversion.

[13]Holloway subsequently was able to get the panel of the Texas court of appeals to grant an untimely misnomered motion for rehearing and reinstate his appeal. The Texas court of appeals, en banc, set aside the reinstatement for violating the Texas Rules of Civil Procedure and for being unwarranted on the merits. The Texas Supreme Court denied the state appellants' petition for writ of error, and this Court denied their subsequent petition for certiorari. *Humble Exploration Company, Inc. v. Browning,* 690 S.W.2d 321 (Tex. App. 1985, writ ref'd n.r.e.). *cert. denied,* 106 S.Ct. 1376, *rhg. denied,* 106 S.Ct. 1807 (1985).

any relief in the state court suit by the bankruptcy court's prior order;

2. a declaratory judgment that the state court judgment was void for lack of due process;
3. a permanent injunction against the defendants from:
   a. taking any further action in the state court case;
   b. pursuing any receivership or injunctive relief;
   c. attempting to enforce or collect on the state court judgment; and
   d. interfering in any way with the plaintiffs' operation of Humble or attempting to manage the assets or interests of any of the plaintiffs in this suit;
4. compensatory and punitive damages for violating or conspiring to violate 42 U.S.C. § 1983 in excess of $200 Million;
5. divestment of any interest of the Brownings or any other defendant in Humble, Holloway or Sterling; and
6. a prohibition against any of the defendants from prosecuting any claims against the plaintiffs or engaging in the same type of businesses in which Holloway, Humble, and Sterling either are or were engaged. (See Appendix B-3 to B-6).

Holloway and the other plaintiffs alleged that the Browning Interests and their attorneys had conspired with the state district judge, Judge Walker, and others to steal Humble, Sterling and other assets by seizing the state court[14] suit

[14]This is not the first time that Holloway has alleged that judges who rule adversely to him were corrupt. In an unsuccessful effort to obtain Texas Supreme Court review of *Atchley v. The Superior Oil Co.*, 482 S.W.2d 883 (Tex. Civ. App. 1982), Holloway, as an attorney, filed a motion for rehearing suggesting that the seven members of the Texas Supreme Court who had denied review were corrupted. The Texas Supreme Court struck the motion for rehearing. Holloway, still acting as an attorney, then filed a federal court lawsuit against the seven sitting

from another state trial court and conducting a sham trial. After several years of discovery and other pretrial

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members of the Texas Supreme Court and the state trial judge for a declaratory judgment that the state court and Texas Supreme Court rulings and judgment were void, alleging various irregularities and improprieties by the judges in the course of the state litigation depriving his client of his constitutional right to due process and equal protection. *Atchley v. Greenhill,* 373 F.Supp. 512 (S.D. Tex. 1974). The district court dismissed the suit, holding in part:

> Defendant justices and judge are charged with personal improprieties in the discharge of their duties as state officials. The concept of minimal federal interference with state government dictates that this matter be dealt with by state procedures. The prospect of federal court reviewing state court proceedings for judicial bias or interest is an effrontery to the concept of federalism. 373 F.Supp. at 515.

The Fifth Circuit affirmed, citing *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923). *Atchley v. Greenhill,* 517 F.2d 692 (5th Cir.), *rhg. denied,* 521 F.2d 814 (5th Cir. 1975), *cert. denied,* 424 U.S. 915 (1976).

In *Browning v. Holloway,* the state court action under attack in this suit, Holloway testified that he had filed the bankruptcy proceedings because the state district judge in whose court the suit was originally filed, Judge Hugh Snodgrass, was crooked. Subsequently, in the direct appeal in the state appellate courts, Holloway argued to the Texas Supreme Court that the judgment of the intermediate appellate court was premised "... on palpably false notions of law, a conscious ignorance of federal court-state court relationships and constitutional law, and a willful misreading of the record." Petitioners' Motion for Rehearing of their Application for Writ of Error, at 7, *Humble Exploration Company v. Browning,* No. C-4129, Texas Supreme Court.

Similarly, Holloway implied improprieties by other judges in his subsequent collateral Lee County cases. Following the Texas Supreme Court's granting a conditional mandamus against Judge Placke, Judge Placke informed the parties that in the future the case would be heard by a fellow judge, Judge Towslee. Subsequently, Judge Towslee dismissed the collateral attack as outside the Lee County courts. In the subsequent appeal, as both appellant and the attorney for all the appellants, Holloway states in the brief of appellants that following the Supreme Court's mandamus ruling, "... Judge Towslee, who apparently assumed control of the case from Judge Placke, either on his own initiative or at the suggestion of the Defendants, then dismissed it for want of jurisdiction." Brief of Appellants, at 5, *Jaehne v. Starnes,* No. 14,693, Texas Court of Appeals at Austin. Holloway's description of Judge Towslee is similar to his allegations that Judge Walker seized control of the original state court lawsuit in order to rule against him.

procedures,[15] the district court granted defendant Ayres' Motion for Summary Judgment with respect to the plaintiffs' procedural due process claim but held that the plaintiffs stated claims of substantive due process which would not be dismissed. (Pet. App. at A-39).

Two weeks later, the district court granted summary judgment for the Browning Interests with respect to the federal claims holding that "Plaintiffs have not, after years of discovery, produced sufficient evidence of a conspiratorial agreement or conduct by the Browning Interests." (Appendix C-3).

The following month, in response to Ayres' motion to reconsider, the district court agreed that the plaintiffs' claims dealt with procedural due process controlled by *Parratt v. Taylor,* 451 U.S. 527 (1981) and *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194 (1984). The court then granted Ayres' motion to reconsider and all the defendants' motions for summary judgment, thereby dismissing the plaintiffs' 42 U.S.C. § 1983 claims with prejudice. (Pet. App. at A-23).

Holloway and the trustee appealed.[16] The Fifth Circuit affirmed the summary judgment granted by the district court, holding that under the *Parratt* and *Hudson* decisions,

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[15]The district court denied the motions to dismiss filed by the various defendants. Judge Walker took an interlocutory appeal. The Fifth Circuit reversed Judge Sanders' denial in part, holding that Judge Walker was entitled to absolute judicial immunity from the plaintiffs' damage claim. This Court denied certiorari. *Holloway v. Walker,* 765 F.2d 517 (5th Cir.), *cert. denied,* 106 S.Ct. 605 (1985). That was the appeal of the motion to dismiss that Petitioner repeatedly and erroneously suggests is this current appeal.

[16]Holloway also purported to appeal on behalf of Humble and Sterling. Prior to the notice of appeal, however, all of the outstanding stock in these two companies had been turned over to the Brownings pursuant to orders of the United States district court in the turnover suit. The new management of the companies did not authorize the appeal, and upon their motion, the Fifth Circuit dismissed the appeal as to Humble and Sterling. *Holloway v. Walker,* No. 85-1289 (5th Cir., Aug. 12, 1985) (order dismissing appeal of Humble and Sterling).

the conduct between Judge Walker and the other defendants alleged to amount to a conspiracy to deny Holloway a fair trial was subject to review in the Texas appellate courts and therefore was not a denial of due process by the state prohibited by the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

Holloway asks this Court to grant certiorari to discuss the scope of the *Parratt* and *Hudson* decisions. He contends that the *Parratt-Hudson* rule is a very narrow exception inapplicable to his case and that the Fifth Circuit's application of the rule conflicts with both the broad application this Court has given to 1983 cases and the narrower interpretations of *Parratt* and *Hudson* by other circuits. The Browning Interests disagree with Holloway's assertion that the Fifth Circuit's application of the *Parratt-Hudson* rule conflicts with this Court's teachings. The holdings of the other circuits may be distinguished from the Fifth Circuit's holding in this case, and, in any event, the Fifth Circuit correctly applied the *Parratt-Hudson* rule, while some other circuits may have attempted to avoid the rule.

Certiorari is not appropriate in this case because there is another basis for denying relief to plaintiffs without even addressing the *Parratt-Hudson* rule. Holloway seeks in this suit an unauthorized review of state court proceedings in lower federal courts. Although this issue was before it in this appeal, the Fifth Circuit chose to address the application of the *Parratt-Hudson* rule. However, the Fifth Circuit concurrently addressed this issue in Holloway's habeas corpus proceeding, where he argued that the Fifth Circuit should grant him relief from a contempt order in the turnover suit because the state court judgment enforced by the district court was constitutionally invalid. (See footnote 11, *supra*).

The Fifth Circuit denied the writ of habeas corpus, holding in part, "The inferior courts of the United States lack jurisdiction to test Petitioner's claim that the challenged state court judgments are constitutionally invalid." (Appendix A-2).

I. THE LOWER FEDERAL COURTS HAVE NO JURISDICTION TO REVIEW THE PROCEEDINGS IN *BROWNING V. HOLLOWAY.*

Holloway asks the lower federal courts in this suit to review the state court proceedings, seeking declaratory and injunctive relief that the state court judgment is void because the state trial judge allegedly conspired with the opposing parties and others to deny him a fair trial, in violation of the Due Process Clause of the Fourteenth Amendment. Such claims do not, however, authorize the lower federal courts to review the state court proceedings because those courts have no power to review individual decisions in state court cases. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476 (1983); *Atlantic Coastline R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286, 296 (1970); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923).

As this Court stated in *Rooker,* 263 U.S. at 415-416:

> If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. . . . Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. . . . To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original.

Holloway's plea for monetary relief in the nature of compensatory and punitive damages directly calls upon the federal courts to review the state court proceedings. He claims the basis for those damages to be in the deprivation of his property by the denial of due process and the denial of a right to fair trial, which he purports to support by testimony of alleged *ex parte* meetings between the trial court judge and attorneys for other parties, combined with attacks on the correctness of the rulings and other decisions made by Judge Walker in the conduct of the state court proceedings. Such reviews of state court proceedings in the lower federal courts is likewise impermissible.

In *Feldman,* this Court rejected similar reasoning, which had been originally adopted by the Fifth Circuit in *Dasher v. Supreme Court of Texas,* 658 F.2d 1045 (5th Cir. 1981), seeking to justify a lower federal court review of a state admission decision, in the following language, 460 U.S. at 482 n.16:

> If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do.

These decisions delineating the role of the lower federal courts control this case. This case, therefore, is not an appropriate vehicle for further explanation of the *Parratt-Hudson* rule.

II. THE FIFTH CIRCUIT'S DECISION SUPPORTS THE RIGHT TO A FAIR TRIAL IN ACCORD WITH THIS COURT'S PRECEDENTS.

Petitioner argues that the Fifth Circuit has trivialized the right to a fair trial and that its holding cannot be reconciled

with this Court's holding in *Aetna Life Ins. Co. v. Lavoie,* 106 S.Ct. 1580 (1986) and its prior precedents, *Ward v. Village of Monroeville,* 409 U.S. 57 (1972); *In re Murchison,* 349 U.S. 133 (1955); *Tumey v. Ohio,* 273 U.S. 510 (1927). Petitioner completely misconstrues the holding and import of the Fifth Circuit's opinion. In no sense does the Fifth Circuit retreat or undermine the proposition that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. at 136. The Fifth Circuit focuses on how the state achieves this policy rather than on the abstract policy itself.

The Fifth Circuit correctly notes that a state may have statutes, policies, or standard procedures which could establish an institutional bias against a party. Indeed, *Ward, Murchison,* and *Tumey* all involved situations of institutional bias. Petitioner's claims, however, do not fall within this category. Instead, his claim is that the state trial judge was bribed by representatives of the opposing parties to deny him a fair trial. There is no allegation by Petitioner that such alleged activity is authorized or condoned by Texas statute, policy or procedures. Under these circumstances, the Fifth Circuit notes that ". . .no judicial system offers any guarantee, other than the postdeprivation right of appeal, that an individual judge will not act arbitrarily or corruptly." *Holloway v. Walker,* 784 F.2d at 1292.

In addition, Texas authorizes pretrial recusal proceedings entitling a party challenging a judge to a hearing before another judge as to the challenged judge's disqualification. Tex. R. Civ. P. 18a. (Appendix D-1). Holloway, in fact, made such a challenge against Judge Walker, alleging that he was biased, that he had improper connections with the opposing parties because he had been represented about a decade earlier in a few civil rights suits by one attorney for

the Browning Interests and the attorney for the state court receiver, and that he conducted numerous *ex parte* meetings resulting in rulings denying Holloway his due process rights. These allegations were heard by Judge Morris Rolston, a visiting retired judge, who found against Holloway on the merits of all these contentions. This Court has recognized that such recusal hearings are appropriate for allegations that a judge is biased in a specific case. *See, Ward v. Village of Monroeville,* 409 U.S. at 61.

Texas permits a denial of recusal to be reviewed on appeal. Tex. R. Civ. P. 18a. If the denial of recusal is found to be erroneous, the complaining party will, at a minimum, be entitled to a new trial before a different judge. This Court followed the same procedure in *Aetna Life Ins. Co. v. Lavoie,* where on direct appeal it reversed and remanded the case for further proceedings without the participation of the disqualified justice. This same procedure was also followed in *Ward, Murchison* and *Tumey.* In each of those cases, this Court granted certiorari in a direct review of the state court proceedings.

In Holloway's direct appeal of the state court judgment, he filed multiple points of error, contending that it was error for Judge Walker to sit on the case.[17] Holloway's appeal was, however, determined adversely to him; the Texas court of appeals dismissed his appeal for abusing the Texas judicial process. *Humble Exploration Company v. Browning,* 677 S.W.2d 111, en banc opinion on motion to reinstate, 690

[17]Petitioner's points of error 20 through 24 all contended that the failure to recuse Judge Walker was reversible error. E.g., point of error number 24 stated, "The failure by the trial court to grant the motion to recuse operated to deprive appellants of procedural due process, as guaranteed by the Constitutions of the State of Texas and of the United States." These points of error were among 211 points raised by Petitioner in his three-volume Brief of Appellants, consisting of over 500 pages.

S.W.2d 321 (Tex. Civ. App. — Dallas 1985, writ ref'd n.r.e.). The effect of a dismissal of appeal is to affirm the judgment below without according to the appealing parties a hearing on the merits of their appeal. *International Ass'n of Machinists v. Federated Ass'n of Accessory Workers,* 130 S.W.2d 282, 283 (Tex. 1939). This result is comparable to a dismissal with prejudice by a federal district court under Fed. R. Civ. P. 37 or 41(b) as a sanction for improper conduct by a party. *See, National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639 (1976).

Holloway then applied for certiorari from this Court in a direct review of the state court judgment. *Humble Exploration, Inc. v. Jane H. Browning,* No. 85-1182. The first question presented to this Court was as follows:

> Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied when a Texas Court of Appeals dismissed their pending appeal from a judgment rendered against them in the Court of first instance by a biased and corrupted judge following an unfair trial, on the ground that Petitioners forfeited their appeal by unsuccessfully collaterall_ ttacking the validity of that judgment when Respondents sued to enforce it in federal court?[18]

[18]In that petition for certiorari, Holloway specifically argued that he had been denied a fair trial by a corrupted judge in the following language:

> In this case, the trial in the court of first instance was not only unfair, but a complete sham. In effect, there was a judgment rendered against Petitioners depriving them of their property without a hearing, for a hearing before a biased and corrupted judge amounts to no hearing at all. [citations omitted]. Judge Walker's relationship with Respondents and his overwhelming prejudice against Petitioners was demonstrated repeatedly throughout the trial. Moreover, after the trial, the federal District Court for the Northern District of Texas ruled in Petitioners' § 1983 action against Judge Walker, Respondents and others, that Petitioners had produced competent summary judgment evidence that Judge Walker and one of the Respondents' counsel were engaged in a conspiracy against Petitioners to rig the outcome of the trial.

This Court has correctly and finally denied that petition for certiorari, *Humble Exploration Company v. Browning,* 106 S.Ct. 1376 (1986) and denied their motion for rehearing. 106 S.Ct. 1807 (1986).

The essence of the Fifth Circuit's holding in this case is that whatever relief a party may be entitled to based on allegations of bias and corruption on the part of a trial judge must be resolved in a direct review of the trial within the appropriate judicial system and not brought as a collateral attack of state judicial proceedings in the federal judicial system.

III. THE FIFTH CIRCUIT CORRECTLY FOLLOWED *PARRATT* AND *HUDSON.*

Petitioner claims that the Fifth Circuit's application of the *Parratt-Hudson* rule ignores a century-old precedent holding that abusive state power may violate the Fourteenth Amendment, even where the state provides adequate procedures for review and redress, citing *Ex parte Virginia,* 100 U.S. 339, 347 (1880), and *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U.S. 278 (1913). The gist of Petitioner's argument seems to be that because the state acts through individuals, his right to due process, therefore, was purportedly violated by Judge Walker's "conduct of a trail, his entry of an award of damages, his imposition of receiverships and constructive trust and his rendering of a judgment N.O.V.

Petition for Writ of Certiorari at 12-13, *Humble Exploration Company v. Browning,* 106 S.Ct. 1376 (1986). He concluded that petition with the following (*Id.* at 23-24):

> Here the application of this new rule of forfeiture to Petitioners is particularly reprehensible since their property was taken from them by a corrupted judge in gross violation of their federal constitutional right to a fair trial before an impartial judge in the first instance — "the right that stands guardian over all other rights." *Dennis v. United States,* 339 U.S. 162, 173 (1950) (Jackson, J., concurring).

— in short, through his exercise in this case of the judicial authority with which the State of Texas clothed him." (Petition at 14-15).

The essence of Petitioner's argument is merely a variation of the inmate's argument in *Hudson*. Palmer complained that Hudson intentionally destroyed certain of his personal property during a shakedown search of his cell. Hudson's alleged deprivation of Palmer's property rights was an abuse of his authority to conduct shakedown searches in the prison. Petitioner's argument in this case is merely a derivation of Palmer's argument that Hudson himself could have provided predeprivation process and that his failure to do so was a denial of due process. This Court rejected Palmer's argument. Holloway claims that the process provided by Judge Walker before the deprivation by the entry of judgment was not adequate in arguing that *Hudson* does not apply. Under Petitioner's analysis, Palmer would have stated a due process violation if he claimed that Hudson had conducted a sham summary proceeding before intentionally destroying Palmer's property. This analysis does not comport with this Court's statement in rejecting Palmer's argument, 104 S.Ct. at 3204:

> Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the *State* is in a position to provide for predeprivation process. (emphasis supplied).

Petitioner also claims that this Court precluded the application of the *Parratt-Hudson* rule to suits claiming that state judges conspired with other persons to deny a fair trial in the state courts when it found in *Dennis v. Sparks*, 449 U.S. 24 (1980), affirming *Sparks v. Duval Ranch Co.*, 604 F.2d 976 (5th Cir. 1979) that private parties who corruptly

conspired with a state judge were acting under color of state law because this Court purportedly:

> . . .took it for granted that they could accordingly be sued under § 1983 for violating due process, notwithstanding the availability of state appellate relief from the corrupt trial court decree (Petition at 9).

Petitioner thus argues, in essence, that a holding that certain actions are "under color of state law" for § 1983 purposes also determines whether there is a Fourteenth Amendment due process violation. The fallacy in this argument is demonstrated by this Court's own posit of the question in *Hudson,* 104 S.Ct. at 3202:

> The question presented for our review in Palmer's cross-petition is whether our decision in *Parratt v. Taylor* should extend, as the Court of Appeals held, to intentional deprivations of property *by state employees acting under color of state law.* (emphasis added).

Neither *Ex parte Virginia* nor *Home Telephone & Telegraph Co. v. Los Angeles* is even relevant to these proceedings. *Ex parte Virginia* was a habeas corpus case before the United States Supreme Court filed by a Virginia county court judge who was indicted in a lower federal court for illegally excluding black citizens from the grand and petit jury list in violation of a federal criminal statute prohibiting racial disqualification from a grand or petit jury. The central issue of the case was whether the federal criminal statute was constitutional. The Court held that Congress' passage of the statute was within its constitutional powers to enforce by appropriate legislation the Thirteenth and Fourteenth Amendments of the Constitution, which were specifically intended to raise the Negro race from the condition of inferiority and servitude in which they had previously been held. The Court held that the Congress could

constitutionally prohibit persons, no matter what their position with a state government might be, from continuing to discriminate on the basis of race in conflict with the equal protection provisions of the Fourteenth Amendment. Nothing in either *Hudson v. Palmer* or the Fifth Circuit's opinion conflicts in any way with the holding in *Ex parte Virginia.*

Home Telephone & Telegraph Co. v. Los Angeles is similarly inapposite. That case dealt with the City of Los Angeles' efforts to fix telephone rates allegedly so unreasonably low that their enforcement worked as a confiscation of the corporation's property. The issue involved in that case was whether the telephone rates had to first be found to comply with the state constitution, which had a similar prohibition against the deprivation of life, liberty or property without due process of law, before they could be challenged as a deprivation of property without due process. This Court held that an unreasonably low rate ordinance could be prohibited by the Fourteenth Amendment without regard to whether or not it was prohibited by the state constitution.

There is no conflict between that holding and the Fifth Circuit's opinion in this case. In fact, *Home Telephone & Telegraph Co.* should be read in light of the Court's decision of last year in *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 105 S.Ct. 3108 (1985). That case was a 1983 suit charging that the application of local zoning laws and regulations amounted to a confiscatory taking of the plaintiff's property in violation of the just compensation clause of the Fifth Amendment as applicable to the states through the Fourteenth Amendment. This Court held that the taking claim was not ripe because the plaintiff had not sought compensation through the state's compensation procedures. The Court specifically analogized its decision to *Parratt* and *Hudson,* stating, 105 S.Ct. at 3121:

> Thus, the State's action is not "complete" in the sense of causing a constitutional injury "unless and until the State fails to provide an adequate postdeprivation remedy for the property loss." *Hudson v. Palmer*, ____ U.S. ____, ____, n. 12, 104 S.Ct. 3194, 3203, n. 19, 82 L.Ed.2d 393 (1984).

IV. ANY ASSUMED DIFFERENCES BETWEEN THE FIFTH CIRCUIT'S OPINION AND THE OPINIONS OF TWO OTHER CIRCUITS DO NOT WARRANT CERTIORARI IN THIS CASE.

In affirming this case, the Fifth Circuit did reject unduly restrictive interpretations of *Parratt* and *Hudson* applied by the Second Circuit in *Patterson v. Coughlin*, 761 F.2d 886 (2d Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986), and the Ninth Circuit in *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985). While these opinions may demonstrate a difference in interpretation of *Parratt* and *Hudson* among these circuits on certain matters, this suit is not the appropriate case to address such differences because *Feldman* and its predecessors make the dispute academic. As this Court states in *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959):

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly.

In addition, the Fifth Circuit has followed not only the letter but also the spirit of *Parratt* and *Hudson* in its opinions in this case, while the Ninth Circuit and the Second Circuit are apparently attempting to minimize the

application of *Parratt* and *Hudson*. In *Bretz v. Kelman*, the Ninth Circuit held that *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), rather than *Parratt*, applied to an allegation in a § 1983 suit that police, prosecutors and personal enemies of the plaintiff conspired to falsely accuse and prosecute him for burglary. In that case, the plaintiff was not attacking the state trial proceeding itself, in which he was *acquitted* for lack of credible evidence. 773 F.2d at 1027. In the view of the Ninth Circuit, *Parratt* did not apply because the keystone to the *Parratt* line of cases was that the alleged conduct was random and unauthorized. The Ninth Circuit noted that a conspiracy is not a random act "...even if it was accomplished without the endorsement of the state government apparatus." The Ninth Circuit concluded:

> As in *Logan*, Bretz is challenging the direct abuse of the state process itself. It is meaningless to speak of the state's ability to provide postdeprivation remedial process when the state process itself has been abused. Consequently, so as in *Logan*, the state cannot satisfy the due process clause here by providing Bretz with a postdeprivation remedy in state court in the form of a tort action for malicious prosecution. 773 at 1031.

The Fifth Circuit declined to follow this reasoning, correctly noting that the Ninth Circuit's interpretation of "random acts" is really simply another aspect of intentional versus unintentional acts treated by this Court in *Hudson*. The Sixth Circuit has also rejected the argument that "... alleged conspiratorial acts of public officials whose duty was to see that plaintiffs were not denied due process" are excluded from random and unauthorized acts of misconduct covered by *Parratt* and *Hudson*. *National Communication Systems, Inc. v. Michigan Public Service Commission*, 789 F.2d 370, 372 (6th Cir.), *cert. denied*, 55 U.S.L.W. 3208, 3235 (Oct. 6, 1986). Under the Ninth Circuit's interpretation,

if two prison officers intentionally destroyed Palmer's property, there would have been a violation of the Fourteenth Amendment whether or not the state provided adequate postdeprivation remedies. This interpretation simply misreads *Hudson*. *Hudson* turns not on the number of persons allegedly involved but on the state providing an adequate compensation mechanism for purported improper but unauthorized and random deprivations by individuals.

The Ninth Circuit's interpretation of *Logan* is also faulty. *Logan* was not a challenge of an abuse of the state process, but rather an attack on the state process itself. A this Court specifically pointed out in distinguishing *Parratt*, 455 U.S. at 436:

> Unlike the complainant in *Parratt*, Logan is challenging not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

The problem in *Logan* was not whether the Commission either negligently or intentionally failed to process a complainant's discrimination charge within a specific period of time, but rather that the institutional legal process of the state itself extinguished the claimant's rights if the Commission for any reason failed to act within a specified time.

Patterson v. Coughlin suffers a similar deficiency. In *Patterson v. Coughlin*, the Second Circuit held that the deprivation of the plaintiff's liberty was not a random and unauthorized event. Therefore, it held that *Parratt* did not apply because the state could provide a predeprivation hearing. In fact, the state provided a hearing but subsequently admitted that the hearing was constitutionally defective. The Second Circuit also held that the postdeprivation proceeding provided by the state was inadequate for the deprivation of liberty. This finding in *Patterson* that the

postjudgment remedy was inadequate distinguishes *Patterson* dramatically from this case. The Fifth Circuit did, however, reject some of the analysis in *Patterson* relied upon by Petitioner. The Fifth Circuit noted that this Court had expressly rejected a similar argument in *Hudson,* 104 S.Ct. at 3204:

> [Respondent] contends that, because an agent of the state who intends to deprive a person of his property "*can* provide predeprivation process, then as a matter of due process he must do so." . . . This argument reflects a fundamental misunderstanding of *Parratt.* There we held that postdeprivation procedures satisfy due process because the *State* cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position to provide for predeprivation process.

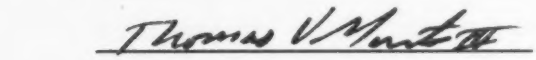
Moreover, subsequent to *Patterson,* the Second Circuit has recognized itself that under *Feldman* and *Rooker* the lower federal courts are not permitted to review state court proceedings. *Texaco, Inc. v. Pennzoil Co.,* 784 F.2d 1133, 1141-1143 (2d Cir. 1986).

Petitioner asks this Court not only to radically limit *Parratt* and *Hudson* to merely trivial losses but also to overrule or ignore its longstanding rule that lower federal courts have no jurisdiction to review state court proceedings.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 22d day of October, 1986, three copies of Brief in Opposition of the Browning Respondents were mailed, postage prepaid, to Mr. Laurence H. Tribe, attorney of record for Petitioner, 1525 Massachusetts Avenue, Cambridge, Massachusetts 02138, and to all counsel of record who appeared for the various Respondents at the court of appeals. I further certify that all parties required to be served have been served.

Thomas V. Murto III

THOMAS V. MURTO III

U.S. COURT OF APPEALS
FILED
MAR 19 1986
GILBERT F. GANUCHEAU
CLERK

In The

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 86-1164

IN RE:

PAT S. HOLLOWAY,

Petitioner

On Application for a Writ of Habeas Corpus

Before CLARK, Chief Judge, POLITZ, and WILLIAMS, Circuit Judges.

BY THE COURT:

Pat S. Holloway petitions this Court to issue a writ of *habeas corpus cum causa ad subjiciendum.* The bases of the petition are threefold: (1) the order of the district court adjudging him to be in civil contempt and fixing the conditions for purging that contempt constitutes a restraint of liberty, (2) this and the underlying turnover enforcement order the district court found to be contempted are not appealable, and (3) the state court judgments enforced by the underlying order are constitutionally invalid.

The order of civil contempt is not a restraint of liberty unless petitioner voluntarily chooses to make it so by continuing to defy the lawful orders of the district court. The entire sequence of turnover orders and enforcement orders issued in aid thereof are injunctive in nature and therefore were appealable. The inferior courts of the United States lack jurisdiction to test petitioner's claim that the challenged state court judgments are constitutionally invalid.

The petition is

DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

PAT S. HOLLOWAY, Individually, HUMBLE EXPLORATION COMPANY, INC., AND STERLING PIPELINE COMPANY, and DON NAVARRO, Trustee of the Estates of HUMBLE EXPLORATION COMPANY, INC. and PAT S. HOLLOWAY,

Plaintiffs,

VS.

JUDGE DEE BROWN WALKER, JUDGE OF THE 162ND JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS, G. H. KELSOE, JR., R. JACK AYRES, JR., Individually, and as a Professional Corporation, JOHN WRIGHT, WHITLEY R. SESSIONS, J. R. HURT, JANE H. BROWNING, Individually as Co-Independent Executrix & as Co-Trustee, of the ESTATE OF WILLIAM W. BROWNING JR., Deceased, MICHAEL G. STARNES, Individually as Co-Independent Executor of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee for Kathryn Louise Browning Cook, Averille Adams Browning, William Webb Browning III, Winifred Fallon Browning, and Robert Holland Browning; CATHERINE AGNES LAND STARNES, Individually; KATHRYN LOUISE BROWNING COOK, Individually, AVERILLE ADAMS BROWNING, Individually, WILLIAM WEBB BROWNING III, ROBERT HOLLAND BROWNING, Individually, and WINIFRED FALLON BROWNING, Individually, and FAIRWAY LAND COMPANY, FAYETTE OIL COMPANY, AMCAP PETROLEUM ASSOCIATES-1977, AMCAP PETROLEUM ASSOCIATES-1977B, AMERICAN HAWK OIL COMPANY, AMERICAN FALCON OIL COMPANY, AMERICAN EAGLE OIL COMPANY, AMERICAN HERON OIL COMPANY, AMERICAN WREN OIL COMPANY, AMERICAN RAVEN OIL COMPANY, HARPER OIL COMPANY and JEFFREY WEISS and DONALD GINSBERG, Individually, and as General Partners of AMERICAN PETROLEUM PARTNERS,

Defendants.

NO. CA-3-82-1846-H

PLAINTIFFS' FIRST AMENDED COMPLAINT AND APPLICATION FOR DECLARATORY AND INJUNCTIVE RELIEF

PAT S. HOLLOWAY, Individually ("HOLLOWAY"), HUMBLE EXPLORATION COMPANY, INC. ("HUMBLE"), STERLING PIPELINE COMPANY ("STERLING"), AND DON NAVARRO, Trustee of the Estates of Humble Exploration Company, Inc. and PAT S. HOLLOWAY ("NAVARRO"), Plaintiffs herein, file this their First Amended Complaint and Application for Injunctive and Declaratory Relief, complaining of JUDGE DEE BROWN WALKER, individually and in his official capacity as JUDGE OF THE 162ND JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS, G. H. KELSOE, JR., R. JACK AYRES, JR., Individually, and as a professional corporation, JOHN WRIGHT, WHITLEY R. SESSIONS, J. R. HURT, JANE H. BROWNING, Individually and as Co-Independent Executrix and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, MICHAEL G. STARNES, Individually and as Co-Independent Executor of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee for Kathryn Louise Browning Cook, Averille Adams Browning, William Webb Browning III, Winifred Fallon Browning, and Robert Holland Browning; CATHERINE AGNES LAND STARNES, Individually, AVERILLE ADAMS BROWNING, Individually, WILLIAM WEBB BROWNING III, Individually, and ROBERT HOLLAND BROWNING, Individually, ("THE BROWNINGS"); FAIRWAY LAND COMPANY, FAYETTE OIL COMPANY, AMCAP PETROLEUM ASSOCIATES — 1977, AMCAP PETROLEUM ASSOCIATES — 1979B, AMERICAN HAWK OIL COMPANY, AMERICAN FALCON OIL COMPANY, AMERICAN EAGLE OIL COMPANY, AMERICAN HERON OIL COMPANY, AMERICAN WREN OIL COMPANY, AMERICAN RAVEN OIL COMPANY, HARPER OIL COMPANY, JEFFREY WEISS and DONALD GINSBERG, Individually and as General Partners of AMERICAN PETROLEUM PARTNERS, (hereinafter the "APP Entities"), and ALLIED

FIDELITY INSURANCE COMPANY ("ALLIED"), Defendants herein, and for their complaint would show the Court:

* * *

197. WHEREFORE, Plaintiffs respectfully pray this Court advance this case on the docket, order a speedy hearing at the earliest practicable date, and upon such hearing enter a permanent injunction enjoining each and every Defendant or any of their agents, employees, attorneys, or persons participating with them from:

1. Taking any further action in the 162nd Judicial District Court of Dallas County, Texas, in Cause No. 82-5742-I, *Fairway Land Company, et al v. Humble Exploration Company, Inc.*, and from acting in any way in any type of legal proceeding involving in any way Humble, Sterling, Pat S. Holloway, his present or former wife, or any present or former officer, employee, or agent of Plaintiffs or any person or entity related to any of the foregoing;

2. Maintaining or pursuing, in any court, any receivership and/or injunctive proceeding and/or relief against any of the named Plaintiffs herein, their agents, servants, employees, attorneys, or persons in participation with them;

3. Attempting to collect or enforce in any way any order or judgment heretofore or hereafter made or entered by Defendant Judge Walker; and

4. Taking any further action in an attempt to interfere in any way with the lawful owner's operation at the business of Humble or from any attempt to manage the assets and/or interests of any of said Plaintiffs herein.

198. Plaintiffs further pray that the Court order any further equitable and injunctive relief as it deems appropriate and necessary to correct the conditions complained of herein.

200. Plaintiffs further pray that this Court grant them their costs of court, reasonable attorney's fees, and such

other additional or alternative relief as may appear to the Court to be equitable, reasonable and just.

PRAYER

WHEREFORE, Plaintiffs pray for a judgment:

1. Declaring that the Stipulation and Agreement which became part of the Bankruptcy Court's judgment rendered by the United States Bankruptcy Court on the docket of said Court establishes a complete and conclusive bar against any relief asserted by the Defendants Browning based in any way on any proceeding occuring by Cause Nos. 82-5742-I or 79-9623-L;

2. Declaring that the final judgment entered by Defendant Judge Walker on August 26, 1982, and all other orders or judgments heretofore or hereafter entered by Defendant Judge Walker in Cause No. 82-5742-I or 79-9623-L are void and of no force or effect for lack of due process;

3. That a permanent injunction be issued ordering the named Defendants, their agents, servants, employees, attorneys and all persons in active concert and participation with them from taking any further action against the named Plaintiffs;

4. That Plaintiffs recover actual damages from Defendants jointly and severally, for Defendants' violation of 42 U.S.C. § 1983, which sum is alleged to be in excess of Fifty Million Dollars ($50,000,000);

5. That Plaintiffs recover actual damages from Defendants for Defendants' conspiracy to violate 42 U.S.C. § 1983 (Count Two) which sum is alleged to be in excess of Fifty Million Dollars ($50,000,000);

6. That Plaintiffs recover as punitive damages from Defendants jointly and severally for their malicious intent to violate 42 U.S.C. § 1983, an amount of at least One Hundred Million Dollars ($100,000,000),

and that Plaintiff Holloway individually recover against Defendants for the mental anguish and suffering caused by Defendants' violation of his civil rights without due process of law in violation of 42 U.S.C. § 1983 in an amount yet to be determined by Plaintiff Holloway;

7. That Defendants be divested of any interest, direct or indirect, in Humble, Holloway or Sterling, and that an order be entered restricting Defendants from prosecuting any claims against any of the Plaintiffs which arose prior to the institution of this action and prohibiting any of the Defendants from engaging in the same type of endeavors as Humble, Holloway, or Sterling is presently engaged in or in which any of them has in the past been engaged;

8. Requiring Defendants jointly and severally to account to Plaintiffs for all moneys received, expended, disbursed, and retained by Defendants from the Plaintiffs;

9. That upon said accounting Plaintiffs have judgment against Defendants, jointly and severally for the amount found due;

10. That Plaintiffs be awarded a judgment against Defendant Wright for his grossly negligent and incompetent mishandling of Humble and Holloway property, assets, and business operations while he was a receiver over the Plaintiffs. The amount of actual and punitive damages has yet to be determined, but Plaintiffs represent that the amount is well in excess of jurisdictional limits of this court;

11. That Plaintiffs recover all damages to which they are justly entitled, which sum is alleged to be in excess of the minimal jurisdictional requirements of this Court;

13. Awarding Plaintiffs their costs of suit and attorney's fees pursuant to 42 U.S.C. § 1988;

14. For the maximum amount of pre- and post-judgment interest on all damages as permitted by law; and

15. Granting Plaintiffs such other and further relief to which Plaintiffs may be justly entitled either at law or equity.

Respectfully Submitted

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U.S. District Court
Northern District Of Texas
FILED
MAR 28 1985
Nancy Hall Doherty, Clerk
By DW
Deputy

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

PAT S. HOLLOWAY, et al.

Plaintiffs

v.

JUDGE DEE BROWN WALKER, et al.

Defendants

Civil Action No. 3-82-1846-H

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendants The Browning Interests'[1] Motion for Summary Judgment and Motion to Dismiss, filed January 29, 1985; Plaintiffs' Response, filed February 21, 1985; and Defendants' Rejoinder, filed March 13, 1985.

Defendants have adopted the Motion for Summary Judgment of Defendant R. Jack Ayres, Jr. Rather than reproduce here the lengthy ruling on that Motion, the Court hereby incorporates the Memorandum Opinion and Order, filed March 11, 1985. The Court granted the Motion with

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[1]Jane H. Browning, Michael G. Starnes, Catherine Agnes Land Starnes, Katherine Browning Cook, Averille Browning Dawson, William Browning III, Winifred Fallon Browning, and Robert Browning.

respect to Plaintiffs' procedural due process claims, and denied it in all other respects.

Defendants here argue that there is no summary judgment evidence linking them with the alleged conspiracy to deprive Plaintiffs of their constitutional right to a fair trial. They argue that they cannot be held vicariously liable for any actions of their attorneys, Defendants Kelsoe and Ayres.

Michael Starnes and Jane Browning have provided affidavits stating that they "handled all of the direction and guidance to the attorneys in [the state cases]." They avow that they had no *ex parte* contacts or communications with Judge Walker[2], and never "authorized either of our attorneys or any other party to make any improper effort to obtain Judge Walker to rule in any manner in our behalf in either the *Browning v. Holloway* case or the *Fairway Land* case". Further, they state that they "have not participated in nor have I or anyone else representing the Browning Interests authorized our attorneys or anyone to manipulate the docket, conspire with others or in any other manner attempt to improperly affect the result of either the *Browning v. Holloway* case or the *Fairway Land* case.

Plaintiffs have produced no evidence rebutting this denial. They have cited no acts allegedly committed in furtherance of the conspiracy by the Brownings. Although there certainly is a line of authority for supervisory liability under § 1983, there is no fact issue as to any improprieties in control or direction of the attorneys, *see Rizzo v. Goode,* 423 U.S. 362 (1976), personal participation, affirmative promotion of a policy which sanctions the type of action which caused the violation, *see Duchesne v. Sugerman,* 566 F.2d 817, 830-31

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[2]Plaintiffs have presented evidence pertaining to alleged ex parte meetings involving Starnes on May 14, 1982, and Jane Browning on August 31, 1982. The May meeting, prior to the filing of the lawsuits, was in no sense improper, *see* Gillette, Weiss, Musselwhite and Ayres affidavits, filed with Defendant APP Entities' Motion, and is not relevant to the civil rights claim as defined by this court. Jane Browning was not present at the August meeting. Nye Affidavit.

(2d. Cir. 1977), or violation of an explicit duty to supervise. *See Howard v. Fortenberry,* 723 F.2d 1206 (5th Cir. 1984).

Although the Court recognizes the importance in a civil rights conspiracy action to allow a plaintiff to prove all permissible inferences from actions shrouded in secrecy, *see Ferguson v. Omnimedia, Inc.,* 469 F.2d 194, 198 (1st Cir. 1972), Plaintiffs have not, after years of discovery, produced sufficient evidence of conspiratorial agreement or conduct by the Browning Interests.

Accordingly, Defendants' Motion for Summary Judgment should be, and hereby is, **GRANTED IN PART** with respect to the federal claims and **RESERVED** with respect to the pendent state-law claims.

SO ORDERED.

DATED: March 28, 1985.

BAREFOOT SANDERS
BAREFOOT SANDERS
UNITED STATES DISTRICT JUDGE

TEXAS RULES OF CIVIL PROCEDURE

Rule 18a. Recusal or Disqualification of Trial Judge

(a) At least ten days before the date set for trial or other hearing in district court, any party may file with the clerk a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.

(c) Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

(f) If the motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

(g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to Article 200a.

(Added by order of June 10, 1980, eff. Jan. 1, 1981.)

This is a new rule.